

**THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON CLYDE RIVER WATER MET IN THE MEETING ROOM, CENTRAL HIGHLANDS COUNCIL CHAMBERS, BOTHWELL, ON TUESDAY 10 AUGUST 2004.**

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**Mr JOHN FOWLER** WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

**CHAIR** (Mr Hall) - We have a written submission from you, so would you like to expand and say what you have to say?

**Mr FOWLER** - Mr Chairman, I thank you for the opportunity to be able to do this. Just to allay my nerves, I might just make a general comment about the irrigation and the importance to this whole community, not just to the irrigators concerned. Historically, Bothwell has been known as quite a prosperous grazing area, but to achieve that in the past it has always had the benefit of relief country, so most of the viable properties that expanded over the years were the ones that had some relief country in the lakes, and that is no longer available on the whole. Much of that relief has been replaced with irrigation, so it is a vital part of a viable grazing enterprise in this area.

Grazing in general has historically been the only viable enterprise for this area, but unfortunately the grazing industry is having lower and lower returns per unit. To remain viable the enterprise has to expand to have larger and larger unit numbers. In my time of farming, I hate to say how long it has been, I think it was generally considered that for a grazing enterprise in this area about 30 years ago, probably somewhere between 2 000 to 4 000 of what we call dry sheep equivalents was considered a viable unit. I think nowadays it is probably considered more like 10 000-plus, and the way the returns for grazing are going it is very soon going to be 25 000 and maybe even 50 000 in the foreseeable future.

If this community stays dependent on grazing, probably this area here will support only four or five farms. The ratio of people who are used to manage those sheep is falling all of the time, and it has probably gone pretty well from 2 000 to 10 000, and it is going to go to 25 000 with one person looking after that size of enterprise. On the whole now, most of the properties around here, as far as their grazing side goes, would be able to manage their enterprises just with family labour, so it does not leave much for this community.

We had a council which is no longer here. There are some employees here but really Bothwell has not had much growth in recent times, apart from irrigation. Irrigation is the growth industry of this area and that is really important. There are things like tourism that are nibbling around the edge but they haven't translated into anything as yet. In the future they may but at the moment irrigation has been the success story as far as keeping this community viable. If you have only four or five farms there would be need for this town to exist, so I think it is really important.

My submission is really based on promoting the committee B process as a fair and reasonable process for the distribution of water rights, which was what our job was. As a general comment on the trust, I feel the irrigators lost confidence in the trust. The main reason, I think, was that the trust was decaying in its membership in that the members weren't being replaced. There was really one member who was really interested in it; the other two used to openly say that they weren't really interested in it and that they were only doing a community service. That did not help the confidence of the irrigators. It did not have any structure. There was no common knowledge as to when meetings were being held; there were no regular meetings, no minutes made available to the irrigators and, in fact, when they asked for them they didn't get them. There was no communication and no policy within the trust. They did not have a structure and I believe the irrigators felt that it was operating in an ad hoc manner.

Once the 1999 Water Act came along it was a really serious issue and committee B was formed. I believe that one of the main aims of committee B was to give people that structure so that they could see why they were given the particular allocation of water and how that was relative to other people who were given allocations of water so that no questions need be asked - 'Why was I given that amount of water?' - because the structure would explain that. I believe that committee B's task was to give a method of allocating water, based on the agreements that were in force at the time and the priority of that supply. I believe that committee B addressed those two important points.

Before I go on to committee B, I will make some comment on some of the questions that were asked by various members of the committee. Mr Fletcher asked a question whether by not using the legal process we were denying people their legal rights. Committee B had a really close look at the agreements that were in force at the time and it was decided that, because the minutes of the trust were not really enforceable legal agreements, we needed some other method of determining that. Part of our structure was to develop a way of defining what the agreements were in force at the time. I don't believe that our process does deny anyone their rights. You did make mention also, Mr Fletcher, that committee B ignored the dollar value of the water. That is true, but it was not ever part of what we were asked to do. But, having said that, also we believe that really, once you have defined the water allocations and given the water rights to the individuals, then the market forces would determine the capital value of those water rights. There are other issues which you have talked about also about the overhead costs and variable costs of the water and how they might be allocated. That is purely an accountancy thing as far as I personally am concerned. Mr Hall mentioned that the Marsden and Jacobs Report became part of the process after committee B finished. In fact they were part of the committee B process. Committee B used them as a reference really to bounce ideas off.

**CHAIR** - So then the facilitator - just correct me if I am wrong - came in after committee B was stood down. Is that what happened?

**Mr FOWLER** - Yes. I believe what happened was that committee B finished its process and it presented its findings and then we had a stalemate and Mr Beattie came in as one option of breaking the stalemate.

**CHAIR** - And he was also involved with some other community members, as I understand it, independent of the irrigators. Is that the case, that facilitator, that committee C, that consisted of -

**Mr FOWLER** - Oh, yes, there was then a committee set up which was Mr Beattie and three non-irrigators on that committee.

**CHAIR** - And you had some input into their deliberations?

**Mr FOWLER** - I was asked for my opinion. I wasn't part of the process. I was just asked to give information. I wasn't reactive in it.

Mrs Smith also asked some questions about sleepers. If I could help to define that, what committee B considered to be sleepers. First of all if I could just say that the information on water usage was only available over 15 years, so what we defined as a sleeper was someone who had only used water periodically within that 15-year period, used water to varying degrees within that 15-year period. A dozer we defined as someone who had some water agreement with the trust but had not used water at all within that 15-year period. Through the committee B process they defined sleepers and dozers for the pre-1976 authority people as 692 acres and for post-1976, as 265 acres. The process we used was to convert those acres to megalitres by multiplying by 1.5.

**Mr WILKINSON** - John, just getting to your sleepers again, you were talking about 692 acres. That was pre-1976?

**Mr FOWLER** - Yes.

**Mr WILKINSON** - That is per sleeper, that is the amount of property they entailed, is it?

**Mr FOWLER** - Yes. Committee B had this problem of what are the agreements in force, and we looked at these history-of-use figures and we rejected those. There was lots of detail around as to why people weren't happy with that, but the end of it was that committee B was not willing to base its water allocations on the history of use, and we came up with this process of going through the Clyde Water Trust minutes and trying to define what the irrigation schemes were that pertained to those particular approvals. We came up with these acres, and then we had to convert these acres into megalitres which we needed for the end of the process. When we allocated, we defined these approvals in acres, we put them into categories because we didn't want to deal with people individually, we wanted to deal with people as groups. There were 692 acres grouped into this sleeper category of the pre-76ers, and 256 in the post-76.

**Mr FLETCHER** - Mr Fowler, I just want to find out a little more about the sleepers and the dozers. It seems to me in listening to other witnesses and reading the submissions that you have had access to mainland situation water trusts and water management authorities, and the like, where sleepers and dozers are defined and are accorded licences. So there has been a track there on which you can base your definition.

**Mr FOWLER** - Yes, but the situation is not identical to other situations. That was the best definition that we came up with. Basically in the Western Australia one, I think, people who had not been using water, when the water rights became structured were asked if they intended to use them in the future. Those who said no lost their water right, I gather, but those who said, 'Maybe' or 'Yes, I will use it in the future' retained their right, even though they had not been using it. These were all people who had irrigated at some

time in the past. They had never been asked that question as to whether they were willing to give up their right, and there were some precedents, the precedent where they had not watered since 1960. It was originally a 300-acre irrigation scheme. They hadn't watered since 1960 and then in about the late 1990s, anyway, they suddenly started to irrigate again. They just rang up and ordered water, it didn't go back to the trust. The permission didn't have to be regranted; it was reactivated purely by picking up the telephone.

**Mr FLETCHER** - I wonder would you comment on my proposition that committee B has used the official records, the minutes of the Clyde Water Trust, to determine certain allocations and to provide a basis for consideration, but nowhere in the official records of the Clyde Water Trust does the concept of sleepers or dozers get a mention at all. Not only has it not been conceived by the Clyde Water Trust at any stage, but there have never been any licences issued and that substantiates that proposition.

**Mr FOWLER** - Every sleeper that's there at some stage was given permission by the trust to water, so they were given permission to water. It wasn't defined as a sleeper. The minutes and things aren't structured well enough to have that sort of structure. That was one of our main problems as to how to structure all of this to get definitions for things that weren't defined. We have given it a name, but what it was, was a person who had been given permission at some stage to water, and hadn't been recently watering, or only recently watering periodically.

I believe the committee B process has achieved what the act asked them to do and, for that reason, having been through this process, I think the wording of the 1999 water act gives what it set out to do, which was to give permanent water allocations for the basis of future water trading. The act specifically says that the job was to allocate water rights in accordance with agreements in force and with particular reference to the priority of that supply. I believe that we defined those two words - 'priority' and 'agreements' - and built a structure that would cope with those. At the end of the committee B process I believe we developed a computer spreadsheet that is very simple to operate and in future, if that system is used, it is purely a matter of putting into the spreadsheet how much water is available for that year and it will throw up what amount of water is available to individuals. I think that is really important because every individual knows the reason why they got that amount of water relative to someone else and there is no argument. It is very clear how much water people are getting under any scenario. That structure can be used for any amount of water up to 15 000 megalitres.

**Mr WILKINSON** - Let us say you have a couple of boys in your family and you have to split your farm up and your property becomes two, how does that fit in with your committee B proposal? Would you look at the total amount of water right that you gave to that property and then say that that person has half of the property and he gets 50 per cent of it?

**Mr FOWLER** - The allocation of water rights happened in 1999. It was a particular point in time, so all this refers back to that time. It is the agreements that were enforced then. Once you have established what people's rights were at that particular point in time, in the future these rights have a value, they have a title, so those titles can be dealt with in exactly the same way as land titles are now. Originally at the end of the squatter era, they had to go through this same process. They had to allocate titles to the land and

market forces and things controlled it from then on. Our job is only to define what the position was in December 1999. If someone has a title in the future, say 1 000 megalitres of water and he has two sons, it his title and I imagine he can give 500 to one and 500 to the other, however he so desires. That wouldn't be a matter for the administrators of the river to decide.

**Mr WILKINSON** - I take it that with the number of people we have had speaking to us they believe that there is room for development within the district and so with the 21 irrigators now, one could easily say that in 20 years' time there are going to be many more than 21 irrigators taking water from the Clyde.

**Mr FOWLER** - Yes, and that is perfectly achievable. In the same way that land gets split up, so can water be split up. Our job is to define it in 1999. I believe that committee B achieved a fair process and that that process can be used in the future to very simply administer the river. There is just the issue of what information you put into that process. I have data on how you deal with these different categories. We have defined the priority, and it is just a matter of how you use that priority.

**Mr FLETCHER** - Was your committee unanimous in reaching these conclusions?

**Mr FOWLER** - No. There was a committee of five but, as with all committees, not everybody agreed to every point.

**Mr FLETCHER** - Did your committee members have any conflict of interest? Were they irrigators with a vested interest in the outcome?

**Mr FOWLER** - All except Peter Bignell, yes.

**Mr FLETCHER** - They all did?

**Mr FOWLER** - Yes.

**Mr FLETCHER** - Were they evenly spread across the range of people?

**Mr FOWLER** - Yes, I believe so.

**Mr FLETCHER** - I am not casting a doubt about the integrity of members of your committee at all, but I am wanting to get a feel about how others will feel about it. You will rightly claim - and justifiably claim, I presume - that it was a committee focussed with the best of intentions of delivering the best possible outcome for the river users. What will others say about you? Will they say 'They all had pre-1976 sleepers and dozers among them, and obviously they would find that way'. Would anyone say that?

**Mr FOWLER** - That was the main aim of spending a lot of time on developing the process, because initially we developed the process and then we let fall what fell out the bottom. We were trying not to be too directive in what the outcome was. We were trying to let that fall out the bottom, so that is why we had this process. At the end of the committee B process it then goes out to the irrigators for comment, and their comment was that most of them accepted it and were happy with it. And then, really, first committee B was a sub-committee of the trust. We made our recommendation, the irrigators had their

input into it, and it was then up to the trust to deal with it. My perception is that the trust was not prepared to do that. And so it got deadlocked.

**Mr WILKINSON** - So the trust seconded your committee to do the work that you have told us about.

**Mr FOWLER** - Yes.

**Mr WILKINSON** - Your committee comprised five who were all irrigators but for Peter Bignell?

**Mr FOWLER** - Yes. I was elected chairman. There was Paul Ellis, Stuart Archer and Henry Edgell, who were all irrigators, and then there was Peter Bignell. At that time he did have an interest in a property, but I think he was divorced from it.

**Mr WILKINSON** - How was that committee derived? Did the trust ask each one of you to be part of it, or alternatively was there a vote amongst the irrigators for that committee?

**Mr FOWLER** - John Marsden from Marsden Jacobs came over to help the trust start the process off, and he gave us an outline of how that might be achieved. He suggested that two committees be formed; committee A, for want of a better word, which was to deal with the lake issues, and committee B which was to deal with these water allocation issues. That happened here at the irrigators' meeting, and out of that irrigators' meeting came this committee.

**Mr WILKINSON** - So the irrigators had a meeting and the irrigators voted the people to your committee and voted on the people to committee A, did they?

**Mr FOWLER** - It was a trust meeting with all irrigators being present. The meeting was called by the Trust. We went through the formal process where the committee was empowered by the minister to do the work.

**Mr WILKINSON** - At the initial meeting when the committees commenced, was there any argument about the committees, that they should not be committees or that so-and-so shouldn't be on?

**Mr FOWLER** - Within the committee itself?

**Mr WILKINSON** - Within the irrigators who were there with the trust when they started these committees.

**Mr FOWLER** - No. My recollection of it was anyone who was allowed to put their hand up.

**Mr WILKINSON** - All those volunteers, one step forward, so everyone else steps backwards.

**Mr FLETCHER** - The important point was that there was a lack of dissension, so anyone might reasonably conclude the committee had the unanimous support of all present. Would you conclude that?

**Mr FOWLER** - Yes. No-one objected to anyone being on there. It was purely, 'Who would like to be on the committee?' and if you put your hand up you're on.

**Mr WILKINSON** - And at that meeting, as I understand it, it was told what would happen; that is, committee A would look at the lakes; committee B would look at the water allocation. Their recommendations would then go out to the irrigators to see whether they had anything to put forward in relation to the recommendations, and then it went back to the trust.

**Mr FOWLER** - Yes, the committees were sub-committees of the trust. Ultimately the decision is the trust's decision.

**Mr WILKINSON** - And in delivering your recommendations in relation to committee B, did you take evidence, if I can call it that, from all the irrigators in the scheme?

**Mr FOWLER** - Yes.

**Mr WILKINSON** - So you spoke with every one of the 21 irrigators to see what they believed was the most appropriate inclusion, and then you came up with your conclusions: is that right?

**Mr FOWLER** - Yes, there were several levels during the process where we came back to irrigators. Mind you, when we came back to irrigators the irrigators did not all agree; individuals did not all agree with what we were saying. I think as a general statement the people agreed with the process. People had problems with how we dealt with them individually, obviously.

**Mr WILKINSON** - Was that the main bone of contention, how each of them was dealt with individually? They said, 'Look we have had x amount of water out of this scheme for however many years. We haven't taken it out in the last couple of years because we haven't needed it but back in 1920 we took a lot out of it and therefore we should get more'. Has there been that type of argument?

**Mr FOWLER** - Yes, we came up with our structure and the process and then we said, 'Right, what do you think of this process?' Not everybody but most people signed off on it and said, 'Yes, that looks all right; we will go with that'. Then they looked at the figures put in there individually for them and then they debated whether we should change those or not. There was a consultative process all the way through.

**CHAIR** - John, we have come to the end of your timeframe. Are there any other questions?

**Mr FLETCHER** - I still have a quick question. With your modelling, what are the variables within that model that have been in contention? I presume one would be the rights of sleepers and dozers to water, that there maybe some who would disagree with the level of their rights. What other variables would be in that model that you can alter that might produce outcomes that would suit one or the other?

**Mr FOWLER** - If you go back to the act, the first thing is agreement. The contention there is what do you call an 'agreement' and what is the basis of that agreement. The main issue of contention there is whether you base that on what has been used in recent times.

We came up with the two options using that or using our acreage-based model. Some people wanted one lot of data used and another group wanted the other lot of data used, but that was the issue.

We looked at the history of use figures and decided that that did not give a fair and reasonable outcome. That is the issue on agreements and out of that comes the sleeper issue. We recognise the fact that these particular people had some agreement at some point in time, so then how do you deal with those. The priority thing came down to it being the 1976 decisions, so how do you deal with that? It was contentious as to how you deal with that.

**Mr FLETCHER** - So your computer modelling - or financial modelling or business case modelling - has certain variables so if the definition was changed then the computer model would spill out a different set of allocations at the other end?

**Mr FOWLER** - Absolutely.

**Mr FLETCHER** - If history of use replaced some other method of judgment, the allocation will spill out at the other end and be different figures?

**Mr FOWLER** - Yes. Basically what we did was use this model and put the different lots of data in there. Then we looked at the outcome and said, 'Does that reasonably represent how it should come out?'.

**Mr FLETCHER** - There is one other question that has been worrying me all along the line and I ask you as a driver of committee B: others have given evidence that the history of use is of no value because people have fudged the figures, in simple terms. That is the allocation you have made, but how can you prove that? What do you know about anybody else's business in the irrigation area?

**Mr FOWLER** - Well, it is more than just people fudging their figures. In my submission are all the reasons; that is just one of them. They are fudging the figures, I am not even saying deliberately. With the irrigation carriers the figures are purely based on a mathematical assessment of the volume of that carrier and that watercourse, how much fall it has on it and therefore it is running at that certain flow rate and so you just write that in your diary. It is not measured; it is just assessed. I gather from Peter Bignell that the variation, even within a day, of the level of the river has quite a large effect on some of the carriers as to what flow they are taking at any time. But it is not just that. With the pump schemes it is a matter of mathematically calculating, from the amount of power that is used, how much water was delivered for that amount of power used. Peter Bignell said that most people did not know how to work that out, so they were inaccurate. I think those pumps were calibrated in 1984. Pump efficiencies drop off over time and there was no check on that.

**Mr FLETCHER** - But aren't these likely to be marginal discrepancies rather than core discrepancies within figures?

**Mr FOWLER** - No. I think even pumps got changed. The history of use also has the problem whereby some schemes draw a gross amount of water but quite a lot of that water then runs back to the river, so it doesn't account for the net amount of water used.



It is only the gross amount. Also, in the 1990s most irrigation at that time was based on grazing, and water for grazing became very marginal. A lot of schemes that had a higher running cost, like pumping schemes which were probably costing \$20 a megalitre, became unviable during that period because they couldn't cover the cost of the \$20 a megalitre. The gravity schemes were only paying \$2 a megalitre, so they were \$18 a megalitre in front to start with. So they continued to expand.

**Mr FLETCHER** - So your allegations of overuse or unregulated use or use that can't properly be measured are based on contentions from Peter Bignell, who was a Rivers and Water Supply Commission employee at that stage, was he?

**Mr FOWLER** - No, he was employed by the trust. A lot of it is anecdotal but it was fairly well accepted.

**Mr FLETCHER** - It is a critical factor, isn't it, if you are arguing to the committee that we should discount the history of use virtually on allegations that cannot be substantiated?

**Mr FOWLER** - There are two levels to that too because when you look at the outcomes of using that - when you put those figures into the model and you look at the outcomes - those outcomes do not reflect the situation, I believe.

In the 1990s when some of the gravity schemes increased their take and the other schemes were reducing their take, no-one thought that by not using their water they were losing their permanent water right. It is the nature of the grazing industry, it is all over the shop, and basically we were in downturn so you cut down your cost of production for that time. We only stay in the industry because we think there is going to be an upturn and you expect then to go back to using water that you have always intended to use.

**Mr FLETCHER** - In a very few words, if you could condense it for me, tell me your argument why should I discount the history-of-use model; three or four very salient points, the key points as to why you want me to discount the history-of-use model.

**Mr FOWLER** - Because it is not accurate, because the outcome is not reasonable, fair or equitable. I gather in common law equitable is relevant.

**Mrs SMITH** - Mr Fowler you were the Chair of committee B and you had the task of recommending to the Clyde Water Trust a policy and a process. You made that recommendation formally, I presume?

**Mr FOWLER** - Yes.

**Mrs SMITH** - Was the committee formally responded to as to why the trust did not accept that recommendation, either by copies of the minutes or by a letter to your committee?

**Mr FOWLER** - The finish of the committee B process was in July and I was not here. What happened was that all of the irrigators did not accept it and there was a belief by some of the irrigators that the legal aspect of it had not been fully explored. The trust gave a commitment to explore the legal aspect of it which was one of the reasons for lack of confidence by the irrigators. They felt that that process did not happen and did not happen properly in that there were no proper terms of reference.

At the end of the committee B process, 17 irrigators agreed with it and 3 did not agree with it. There was the July meeting when it was decided to get the independent legal opinion. When that did not happen then the meeting was called with the facilitator to try to break the nexus. At that meeting with the facilitator there was a vote taken. Most of the irrigators agreed to go with the committee B process. There were two who were prepared to have some sort of compromise worked out and one that did not want any compromise.

Out of that meeting the majority of irrigators agreed to form committee C, take it away and have another look at it but the outcome of that most irrigators were not happy with.

**Mrs SMITH** - The issue in July was there were to be some legal opinions and that was not facilitated by the trust. Are you of the belief that if there had been an open and transparent process of getting legal opinions, you may have been able to finalise committee B with the approval of all players?

**Mr FOWLER** - The problem with the committee B process was to do with 1976 and what was termed an illegal agreement. I think it was generally felt that we were being threatened by this so-called legal agreement, the legal avenue of solving the problem, and that that needed to be sorted out because it was just being used as a threat.

**Mr WILKINSON** - Do I take it that what you're saying is you came back to the trust with your committee B proposal? The irrigators, because of what was said, thought if this proposal is put forward and the trust accepts that and allocates water the way you said it should be allocated, there could be a legal challenge to that allocation which would mean the trust then would have to maybe foot the bill of that legal challenge if they lost.

**Mr FOWLER** - Yes.

**Mr WILKINSON** - So therefore, because the trust wanted to, I suppose, save money and make sure of their standing, it was agreed that they go out and get independent legal advice on what was put forward to them, and that's where the whole thing fell over.

**Mr FOWLER** - Yes, I think so. The suspicion was because the terms of reference weren't readily available, that the legal advice was actually to further a particular agenda.

**Mr WILKINSON** - Right, yes.

**Mr FOWLER** - So it wasn't transparent that it was a broad-based opinion.

**Mr WILKINSON** - But your belief is that - and I'm calling it a threat whether it was a threat or not, I don't want to argue - that threat of legal action stymied the trust accepting your proposal with committee B?

**Mr FOWLER** - I'd have to say yes because that's what the trust said.

**Mr WILKINSON** - Okay, thank you.

**CHAIR** - Okay. Anything very short and very final, John, before we wind up?

**Mr FOWLER** - I believe it's a very thorough process and that it produces what most people consider a fair outcome. It isn't a legal outcome, and nobody really believes, I think, that the legal outcome is a satisfactory outcome, which is really part of my answer to Mr Fletcher. Once the dust is settled, it's a good basis for the future operation of the administration of water. Remember, we only have to allocate this water once, from then on it becomes purely an administrative process. This is the allocating of water rights.

**CHAIR** - Thank you very much for your evidence.

**THE WITNESS WITHDREW.**